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In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, NATIONAL EMPLOYMENT LAW PROJECT, AND PUBLIC JUSTICE, P.C., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

***Amicus* the National Employment Lawyers Association (NELA)** is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism, ethics, and judicial integrity.

NELA is interested in this case, and is filing a Brief in support of Petitioner Vicky S. Crawford because of the potential detrimental effects that the Sixth Circuit's decision, if left intact, will have on workers' rights and employers' responsibilities regarding sexual-harassment investigations. The Sixth Circuit's narrow interpretation of "protected activity" for purposes of Title VII's anti-retaliation provision undermines the goals of Title VII's anti-discrimination

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[1] Pursuant to Rule 37.6, the *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than the *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Rule 37.3, letters consenting to the filing of this Brief are filed with the Clerk of the Court.

provisions by chilling the truth-finding process that lies at the heart of Title VII.

By denying protection to an employee-witness who complied with her employer's internal investigatory procedures, the Sixth Circuit's decision pits employee against employer, and subverts Title VII's goal of voluntary compliance, which requires employers and employees to cooperate in identifying and eradicating sexual harassment, as well as other forms of discrimination in the workplace.

Lastly, the Sixth Circuit's decision will have a negative impact on the EEOC, and on practitioners who are trying to advise their clients who are called upon to participate, in some manner, in an internal sexual-harassment investigation. By creating a requirement that an EEOC charge be filed in order to ensure protection for certain types of conduct occurring during internal investigations, the EEOC will be deluged with "preemptive" charges, employees will face a Hobson's choice with respect to responding to an internal investigation, and practitioners will be in a position of advising witnesses to either file an EEOC charge on behalf of a third party, or engage in insubordination by refusing to cooperate.

Because these outcomes are wholly undesirable and contrary to congressional intent with respect to both Title VII and its anti-retaliation provision, this Court must reverse the Sixth Circuit's decision in this case to maintain appropriate order and balance within Title VII's anti-retaliation scheme.

***Amicus* the American Association of University Professors (AAUP)** was founded in 1915, and is an association of over 46,000 faculty members and other academic professionals in all academic disciplines. The AAUP has participated before this Court in numerous *amicus* briefs, including *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Smith v. City of Jackson*, 544 U.S. 228 (2005); and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). The Association has taken a strong stand against discrimination by institutions of higher education. *See, e.g.*, On Discrimination, POLICY DOCUMENTS & REPORTS 299 (10th ed. 2006).

In addition, the Association recommends that procedures for investigating allegations of sexual harassment by, or against, faculty members recognize the integral role faculty must have in such investigations. *See* Sexual Harassment: Suggested Policy and Procedures for Handling Complaints, *id.* at 244. The AAUP's suggested procedure recognizes that faculty members and other employees may be asked to participate in a faculty review committee hearing well before the initiation of legal proceedings. *Id.* at 244, 245. Without the assurance that those witnesses will be protected against retaliation, such committees could not function effectively. *See also* Statement on Government of Colleges and Universities, *id.* at 135 (generally advocating for an integral faculty role in university and college governance). The AAUP believes that protecting the functioning of investigative committees and the witnesses who appear before them is integral to ensuring effective measures against harassment in academe and protecting institutional self-governance at universities

and colleges. The Sixth Circuit's decision, if allowed to stand, would undermine the critically important interest in protecting employees who cooperate with internal investigations of harassment and other forms of discrimination.

***Amicus* the National Employment Law Project (NELP)** is a non-profit legal organization with over 30 years of experience advocating for the employment and labor rights of low-wage and immigrant workers. In partnership with community groups, unions, and proactive public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, regardless of an individual's immigration status as an immigrant.

NELP's areas of expertise include the workplace rights of documented and undocumented immigrant workers under federal employment and labor laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of immigrant workers under the Fair Labor Standards Act and the National Labor Relations Act, state workers' compensation, and other acts. NELP also provides legal assistance to labor unions and immigrant worker organizations regarding the rights of immigrant workers in relation to the Bureau of Immigration and Customs Enforcement, formerly the Immigration and Naturalization Service, and state and local law enforcement.

***Amicus* Public Justice, P.C.,** is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in the

courts. Public Justice specializes in precedent-setting and socially significant individual and class action litigation. Litigating throughout federal and state courts, Public Justice prosecutes cases designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, workers' rights, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless.

We also have special projects that preserve access to justice by fighting federal preemption, unnecessary court secrecy, class action bans and abuses, the misuse of mandatory arbitration, and other efforts to deprive people of their day in court. Public Justice is dedicated to fighting discrimination and retaliation in the workplace, schools, and places of public accommodation. We have litigated numerous discrimination and retaliation cases under federal civil rights statutes, including Title VII of the Civil Rights Act of 1964, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.

Based on Public Justice's experience and expertise in litigating discrimination and retaliation cases, we believe that the Sixth Circuit's narrow interpretation of Title VII's anti-retaliation provision unjustifiably fails to protect employees who cooperate with, but do not initiate, internal company investigations. Denying protection in these circumstances will deter employees – especially women – from telling their employers about harassment and other forms of discrimination, thereby hindering the discovery and elimination of Title VII violations.

SUMMARY OF THE ARGUMENT OF *AMICI CURIAE*

When Petitioner Vicky S. Crawford's employer, the Metropolitan Government of Nashville & Davidson County, was investigating reports of sexual harassment by a particular supervisor, the investigator asked her if she had witnessed any such sexual harassment. Crawford answered her employer's questions truthfully and relayed that she, too, had been sexually harassed by this supervisor. Crawford alleges that she was terminated for providing damaging evidence against the supervisor during the internal investigation.

The Sixth Circuit subsequently held that even if Crawford was, indeed, terminated for what she said in response to her employer's investigatory questions, that conduct fell outside the scope of the anti-retaliation protections of Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). According to the Sixth Circuit, Crawford's conduct was neither "participation," nor "opposition" protected under Section 704(a).

Whether viewed under the "participation clause" or the "opposition clause" of Section 704(a), Crawford's conduct must be protected against employer retaliation. Congress enacted Title VII to eradicate discrimination, and included an anti-retaliation provision to secure that objective by preventing employers from interfering with employee efforts to advance the goals of Title VII's anti-discrimination provisions.

This Court has recognized that the preferred method for eradicating unlawful discrimination is voluntary compliance by employers. The success of voluntary compliance depends on employees speaking out about, and bearing witness to, unlawful discriminatory conduct in the workplace. Thus, the cornerstone of any employer's voluntary compliance effort is a truth-finding process that contemplates open communications between employer and employee, which are designed to identify and remedy unlawful discrimination and harassment in the workplace.

The Sixth Circuit's interpretation of both the participation and opposition clauses of Section 704(a) is not only contrary to Congress's intent and this Court's established precedent, but also wholly undermines the truth-seeking process on which effective enforcement of Title VII depends. By excluding internal employer investigations from the protections of the participation clause, the Sixth Circuit's decision chills the testimony of would-be witnesses, who, under the Sixth Circuit's strained reading of Section 704(a), are left unprotected from retaliation for providing truthful – and sometimes damaging – information to their employers. As a result, internal investigations will be stymied and employers will be hampered in their efforts to ascertain the truth of what happened, and thus will be unable take appropriate action to prevent what may be unlawful discrimination or harassment.

Similarly, by construing the opposition clause to protect only conduct that is "overt," "active," and "consistent," the Sixth Circuit's decision creates a barrier to achieving Title VII's goals by excluding

various types of employee conduct that should otherwise be protected under Section 704(a).

The only limitation courts have traditionally placed on opposition conduct is that it must be reasonable and in good faith. Construing the opposition clause broadly – but with appropriate limitation on the reasonableness of employee conduct – ensures that employees will come forward to identify conduct they believe violates the law, or will provide further information to corroborate other reports of violative conduct.

Unfettered access to such critical information from a key source – employees – ensures that employer investigations maintain their efficacy within the Title VII scheme. However, by excluding a wide range of employee conduct from opposition protection, the Sixth Circuit's decision hinders the truth-finding process that underlies an employer's investigatory efforts by chilling employees' words and actions that would initiate, or further, these efforts.

The Sixth Circuit's holding also requires an EEOC charge to have been filed before conduct like Crawford's becomes protected by Section 704(a) – a wholly improper emphasis on the timing of an employee's conduct. Under the Sixth Circuit's analysis, the key inquiry is no longer *what* the employee did, but *when* she did it. This result is contrary to the plain language of Section 704(a) and Congress's intent, and it creates significant problems for the EEOC, as well as practitioners advising clients who are victims, or witnesses, or both.

Witnesses and victims alike will now be forced to file "preemptive" EEOC charges for the sole purpose of protecting their participation in any investigatory process designed to ascertain the validity of the allegation and address it appropriately. Such an influx of charges will strain the resources of the EEOC, and will frustrate the purpose of voluntary compliance, which seeks to discourage initial involvement of the EEOC and the courts, and encourage resolutions reached by the employer and its employees.

Practitioners advising victims and witnesses must likewise encourage those individuals to be wary of any employer internal processes, and, instead, file an EEOC charge to ensure protection from retaliation for participating in the employer's investigation. Worse, practitioners whose clients are not in a position to file an EEOC charge must advise these individuals of the perils of participating in the employer's investigation: answer questions, and be subject to retaliation for doing so; or refuse to answer questions and be subject to discipline for insubordination.

Because the Sixth Circuit's constrained interpretation of the opposition and participation clauses of Section 704(a) severely impairs the truth-finding process underlying Title VII's remedial scheme, and creates untenable obstacles for employment practitioners and their clients, the *Amici* respectfully request that this Court REVERSE the Sixth Circuit's decision.

ARGUMENT

I. Excluding an employer's internal investigation of sexual harassment from protection under Section 704(a) of Title VII chills the truth-finding process, which is protected by both the "participation" and "opposition" clauses of the anti-retaliation provision, and which is vital to upholding and enforcing Title VII's remedial scheme.

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII, and who participate in Title VII proceedings:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (2007).

In the recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, this Court plainly held that Section 704(a) serves to protect employees who complain to their employers about Title VII violations. *See generally* 548 U.S. 53, 126 S.Ct. 2405 (2006). According to *Burlington Northern*, the law prohibits "employer actions that are likely 'to deter victims of

discrimination from complaining to the EEOC,' the courts, and their employers." *Id.* at 2415 (internal citations omitted).

The *Burlington Northern* decision dovetails with this Court's prior precedent recognizing that effective internal employer grievance processes are critical to preventing discriminatory conduct before the conduct becomes unlawful. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764, 118 S.Ct. 2257 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145, 124 S.Ct. 2342 (2004) ("an employer's effort to install effective grievance procedures could serve Title VII's deterrent purpose by encouraging employees to report harassing conduct before it becomes severe or pervasive") (internal citation omitted).[2]

This Court has also recognized that Congress's express purpose in enacting Title VII's remedial measures was to induce employers to "self-examine" and eliminate discrimination:

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[2] In a recent public-employee speech case, *Garcetti v. Ceballos*, this Court also recognized the robustness and importance of "the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing." 547 U.S. 410, 126 S.Ct. 1951, 1962 (2006). To permit the Sixth Circuit's construction of Title VII to stand would be to undermine this Court's assurance in *Garcetti* that employees willing to partake in exposing misconduct can continue to rely on the web of protective legislation designed to deter against and remedy such misconduct.

> Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358, 115 S.Ct. 879 (1995) (internal citations omitted).

The importance of this process is reinforced by guidance from the EEOC interpreting and implementing the decisions of this Court, such as *Faragher* and *Ellerth*. *See* 29 C.F.R §1604.11, App. A (2007) (extending a "safe harbor" to employers undertaking an affirmative process to eradicate even the need to file a charge). Thus, the integrity of this pre-charge process hinges on employees participating in this process with a full guarantee that they will receive the same protections as those who participate in an ensuing investigation, should a charge be filed.

A. An internal sexual-harassment investigation must be a "Title VII investigation" or "proceeding" for purposes of the participation clause of Section 704(a) because employers and employees, alike, rely on these investigations to achieve Title VII's goal of identifying and eliminating unlawful practices from the workplace.

The participation clause of Section 704(a) protects employee conduct that includes filing a charge, testifying, assisting, or participating *in any manner* in

"an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (2007) (emphasis added). This clause is intended to be construed broadly. *E.g.*, *Deravin v. Kerik*, 335 F.3d 195 (2d Cir. 2003) ("participation clause is expansive and seemingly contains no limitations"); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) ("The words 'participate in any manner' express Congress' intent to confer 'exceptionally broad protection' ").

In fact, courts have interpreted the participation clause so broadly as to protect not only individuals who provide information supporting or corroborating a report of discrimination or harassment, but even the individual who is the alleged harasser or discriminator:

> [I]t may well advance the remedial purpose of Title VII to shield all participation, including participation by an employee accused of illegal discrimination, to ensure the overall integrity of the administrative process and encourage truthful testimony.

Deravin, 335 F.3d at 204. In addition, courts have rejected arguments that only "reasonable" testimony is protected by the participation clause. *See, e.g.*, *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (rejecting employer's contention that plaintiff's "unreasonable" deposition testimony was unprotected).

Protecting the victim, the accused, and even a witness who provides "unreasonable" testimony ensures investigators that they have unfettered access

to all information necessary to determining whether unlawful conduct did, in fact, occur. *See id.* ("Section 704(a)'s protections ensure . . . that investigators will have access to the unchilled testimony of witnesses."). Accordingly, interpreting Section 704(a)'s participation clause broadly to include all manner of participation is vital to ensuring that an employer's internal investigators may ascertain the truth of the allegations giving rise to an investigation.

In this case, the Sixth Circuit's myopic interpretation of the participation clause leaves employees such as Vicky Crawford vulnerable to retaliation for answering questions during an employer's internal investigation of a sexual-harassment report by another employee. If employees are not protected by Title VII's anti-retaliation provision, they will be placed in an untenable position. When they are asked to participate in such a voluntary compliance process, they will be caught between their employer's request and a very reasonable fear that, if they comply, they will be vulnerable to retaliation.

As a result, witnesses who are asked to be interviewed in an internal investigation may refuse or otherwise feign ignorance or forgetfulness, undermining the clear intent of Title VII. Worse, these witnesses may go so far as to lie about what they know, or hold back details that are essential to ascertaining the validity of the allegations. Compromised witness testimony will render it difficult, if not impossible, for internal investigators to determine what happened and what action to take, if necessary.

Accordingly, without meaningful witness testimony during an internal investigation, the employer's efforts to seek the truth and take appropriate action are thwarted. Because the Sixth Circuit's decision hampers employers' ability to fully and fairly investigate reports of harassing conduct by rendering witness testimony impossible to obtain, or patently unreliable, its decision has likewise eviscerated what this Court has long recognized as Title VII's goal of eradicating unlawful discriminatory and harassing conduct, and fostering voluntary compliance.

Accordingly, the *Amici* respectfully request that this Court reverse the Sixth Circuit's decision and recognize that employers' internal investigations are, indeed, an integral part of the process of Title VII investigations and proceedings for purposes of Section 704(a).

B. Interpreting "opposition" to include only acts that are "active," "consistent," and "overt" inappropriately raises the threshold for protected conduct under Section 704(a), and thereby undermines the truth-finding function that internal investigations serve and that Title VII's anti-retaliation provision seeks to uphold.

Section 704(a)'s opposition clause protects any employee who "has opposed any practice made an unlawful employment practice by this subchapter. . . ." 42 U.S.C. § 2000e-3(a) (2007). The opposition clause has been consistently interpreted broadly, excluding only employee conduct that is unreasonable or demonstrates bad faith. *See, e.g., Johnson v.*

University of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000) ("the only qualification . . . is the manner of his opposition must be reasonable."); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000) (slapping harasser is not opposition activity); *Smith v. Texas Dep't of Water Resources*, 818 F.2d 363 (5th Cir. 1987); *Hochstadt v. Worcester Found. For Experimental Biology*, 545 F.2d 222 (1st Cir. 1976); *see also* 2 EEOC COMPLIANCE MANUAL, § 8, p. 8-7 (1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf ("manner of opposition must be reasonable").

The EEOC has specifically addressed employees responding to inquiries during internal investigations, characterizing employee responses as "opposition":

> In the Commission's view, when an employer initiates an internal investigation of alleged discrimination in the workplace, an employee who is invited (or required) to cooperate with the inquiry has an objectively reasonable belief that, by providing relevant information to the designated investigators, s/he is opposing a practice made unlawful by Title VII.

2 EEOC COMPLIANCE MANUAL § 2-II(A)(5), n. 41 (1998), available at http://eeoc.gov/policy/docs/threshold.html.

This definition of "opposed," as used in Section 704(a), should include all conduct reasonably aimed at assisting with the process of determining whether unlawful conduct under Title VII occurred – which, by definition, must include answering an employer's inquiries during an internal investigation aimed at

prompt remedial action. In fact, the EEOC has specifically defined "opposition" to include providing such information:

> Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII. The very fact that the employer has initiated an investigation of alleged discrimination is sufficient to demonstrate the "objective reasonableness" of the employee's belief that, by providing information relevant to the inquiry, s/he is opposing an employment practice made unlawful by Title VII.

Id. (rejecting the 11th Circuit's decision in *Clover v. Total Sys. Serv's, Inc.*, 176 F.3d 1346 (11th Cir. 1999)).

Moreover, "opposing" need not mean "complaining." Indeed, the same opposition clause language under the Americans with Disabilities Act, 42 U.S.C. §12203(a), has been interpreted to allow a simple request for accommodation under the ADA to constitute protected activity, even before any formal charge is filed. *Soileau v. Guilford of Maine*, 105 F.3d 12, 16 (1st Cir. 1997) ("It would seem anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge."); *see also Garza v. Abbott Labs.*, 940 F. Supp. 1227, 1294 (N.D. Ill. 1996) (plaintiff engaged in statutorily protected expression by requesting accommodation for her disability); 2 EEOC

COMPLIANCE MANUAL, § 8, p. 8-6 (1998), *available at* http:// www.eeoc.gov/policy/docs/retal.pdf.

In this case, the Sixth Circuit improperly rejected Crawford's reliance on the opposition clause because her conduct was not "active," "consistent," or "overt." By imposing limitations on the definition of opposition conduct that go well beyond "good faith" and "reasonable," the Sixth Circuit's decision severely undermines the purpose of an employer's internal investigation, and exposes employees to retaliation for voluntarily complying with such investigations.

Surely those who cooperate in internal investigations of sexual-harassment complaints – and particularly those who provide corroborating information, as Crawford did – are seeking to expose wrongdoing. Witnesses such as Crawford must be able to rely on legislative guarantees designed to protect the process by which employees expose wrongdoing, and thereby seek to assist their employers in remedying it. However, the Sixth Circuit's narrow construction of Section 704(a) in this case threatens the process of identifying and exposing wrongdoing by taking away from would-be witnesses any guarantee that their role in the system will remain protected under the legislative provisions designed specifically for their benefit.

In addition, raising the bar for protected opposition conduct to such a heightened level excludes a host of activities by employees that is designed to assist an employer's voluntary compliance with Title VII's mandates of identifying unlawful conduct, and determining whether it did, in fact, occur, and taking

prompt remedial action. For example, if an employer asks a complainant's supervisor to "encourage" the complainant to drop her complaint, and the supervisor reasonably refuses to do so, the supervisor has engaged in a single act. By refusing her employer's request to deter the complainant, the supervisor places her employer on notice that she will not be complicit in an effort to circumvent the process necessary to Title VII's aim of identifying potentially unlawful conduct and taking prompt remedial action.[3]

Under the Sixth Circuit's decision in this case, however, the supervisor's refusal to act – though reasonable and in good faith – would not be protected opposition conduct because it is not "overt," "active," or "consistent." This is so even though both employee and employer understand the clear message behind the refusal. Thus, the employer would be free to terminate the supervisor in retaliation for her refusal to support the employer's effort to obfuscate the truth-finding process, and thereby shirk its duty under Title VII to provide a discrimination-free workplace.

Similarly, in this case, the fact that Vicky Crawford did not initiate the discourse with her employer regarding the egregious acts of harassment that Hughes inflicted upon her is of no consequence. By

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[3] This example was taken from the EEOC Compliance Manual, which states that "refusal to obey an order also constitutes protected opposition if the individual reasonably believes that the order makes discrimination a term or condition of employment." 2 EEOC COMPLIANCE MANUAL, § 8, p. 8-6 (1998), *available at* http:// www.eeoc.gov/policy/docs/retal.pdf.

answering the Metro investigator's questions, Crawford was acting reasonably and in good faith to make her employer aware of the truth about this supervisor's conduct towards other women in the same workplace – thereby, "opposing" his conduct towards her.

The Sixth Circuit's artificial restrictions on "opposition" under Section 704(a) serve only to exclude conduct that otherwise serves as a reasonable and good-faith effort to assist employers in voluntarily complying with Title VII. Accordingly, because these restrictions are contrary to the overlapping goals of Title VII's anti-discrimination provisions and Section 704(a) vis-à-vis the truth-finding processes of internal investigations, this Court must reverse the Sixth Circuit's decision.

II. The Sixth Circuit's decision improperly emphasizes the timing of an employee's conduct, and thereby places unnecessary and unworkable burdens on both the EEOC and employment practitioners whose clients are asked to participate, in some manner, in their employers' internal investigations.

Lower courts have consistently recognized that Section 704(a) is intended to protect employees during their interactions with their employers about potential Title VII violations, even before a formal charge is filed with the EEOC. In the context of disputes concerning the application of the opposition clause, the policy favoring protection for an employee's participation in internal investigations by employers before an EEOC charge is pending has been routinely acknowledged.

See, e.g., Parker v. Baltimore & Ohio R. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

In this case, the crux of the problem created by the Sixth Circuit's interpretation of both the participation and opposition clauses is the timing of the conduct in question. The Sixth Circuit's decision creates obstacles to both opposition and participation protection that hinge on nothing more than when the employee's conduct occurred; thus, under the Sixth Circuit's interpretation of Section 704(a), the key inquiry is no longer *what* the employee did, but *when* she did it.

In Crawford's case, under the Sixth Circuit's decision, a simple change in the timing of her conduct would produce a completely opposite result under both the participation and opposition clauses of Section 704(a). If Crawford had participated in her employer's investigation after another employee had filed an EEOC charge relating to Hughes's harassment, her conduct would clearly be protected under Section 704(a)'s participation clause. And if Crawford had reported Hughes's conduct to Metro before its investigator approached her, her conduct would clearly be protected under Section 704(a)'s opposition clause.

The illogicality of the Sixth Circuit's interpretation of Section 704(a) is further underscored by this scenario: if the Metro investigator brought Crawford to her office to ask her questions about Hughes's conduct in the workplace, to avoid permissible retaliation for

simply answering those questions, Crawford would have to refuse to respond. Then, to guarantee herself protection from her employer's retaliation, Crawford would have to immediately return to the investigator's office to lodge her own report about the harassment she endured, and then – and only then – answer the investigator's questions. Such a convoluted scenario is not what Congress intended when it enacted Title VII, and it is wholly inconsistent with this Court's interpretation of Section 704(a).

By elevating the timing of the employee's conduct to the forefront of the analysis under Section 704(a), the Sixth Circuit's decision will also create serious problems for the EEOC and for employment practitioners advising clients who are both the victims of unlawful harassment, and witnesses in their employers' internal investigations. Under a scheme where the substance of the employee's conduct is subordinated to the timing of it, the process of determining sufficient facts to identify and eradicate unlawful discrimination will be harmed.

Because the Sixth Circuit's decision requires that an EEOC charge be filed before participation conduct may occur, victims of harassment will now rightly feel that they must not only report the harassment to their employer, but also immediately report it – prematurely – to the EEOC. Likewise, practitioners must advise their victim-clients to immediately file a charge with the EEOC, as well as report the conduct to the employer.

With respect to clients who are witnesses in an investigation, practitioners must advise these clients

to stave off the employer's questioning during any internal process unless they are assured that an EEOC charge has been filed. If no charge has been filed, or if the witness-client is unsure, practitioners must advise this client that, to be protected from retaliation, he or she must first file EEOC charges on behalf of the alleged victim. If the witness has also been the victim of harassment – as Crawford was – the practitioner must advise the witness to refuse to answer questions until she files her own EEOC charge. Although the practitioner could advise the witness/victim to file an internal report about the harassment, if that report does not rise to the level of conduct required by the Sixth Circuit, it is not guaranteed to be protected activity. Thus, the only definite guarantee of protection from retaliation is to file an EEOC charge.

Under any of these scenarios, the EEOC will be deluged by "preemptive" charges filed by victims, witnesses, and, in some cases, both, for the sole purpose of ensuring protection from retaliation against witnesses in any employer investigation. This onslaught of charges – especially where they are duplicative – will undoubtedly place an added strain on the resources of the agency, and will likely result in the dismissal of these charges, based on the standards for proving actionable sexual harassment.

If the victim-client is unwilling, or unable, to file an EEOC charge, then practitioners will be forced to advise the victim that her efforts to assist her employer in identifying and eradicating potentially unlawful conduct may leave her unprotected. Without statutory protection for employee-witnesses, any investigation of the victim's report will be suspect at

best, and may even result in adverse action against the victim for making what the employer perceives to be unsupported allegations against a co-worker or supervisor.

Likewise, if the witness-client is unwilling, or unable, to file a charge with the EEOC – for example, because he simply does not have all of the facts – then the practitioner must advise the would-be witness that he participates in his employer's internal investigation at his peril. This presents the witness-employee with the Hobson's choice of answering his employer's questions honestly, and being vulnerable to termination in return; or engaging in insubordination by refusing to comply with the employer's request to participate in the investigation.

While Title VII does allow for charges to be filed by any person on behalf of a victim of harassment, certainly the law was not enacted to protect against a timing technicality problem. Rather, as this Court has repeatedly recognized, Congress's objective was to minimize the need to resort to the EEOC and the courts, and create a system of voluntary compliance. Instead, the Sixth Circuit's decision drives victims and witnesses directly to the formal EEOC process and to the courts – to the extent they are not chilled from reporting or participating in the first place – in an effort to ensure that they will not suffer adverse employment action for providing their employers with truthful information in response to an internal sexual-harassment investigation.

Because the ramifications of the Sixth Circuit's decision extend beyond the facts of this particular case,

and have the potential to impact the victims of sexual harassment, the individuals who bear witness to the harassment, and the practitioners trying to advise both groups of their legal rights and remedies, the Sixth Circuit's opinion must be reversed.

CONCLUSION

For all of the above reasons, the *Amici Curiae* filing this brief in support of Petitioner Vicky S. Crawford respectfully request that this Honorable Court REVERSE the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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